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ASIA COMMERCIAL FINANCE (M) BHD

v.

BASSANIO TEO YANG

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HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[BANKRUPTCY PROCEEDINGS NO: 29-225-1999-III]
7 APRIL 2009

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BANKRUPTCY: *Discharge - Appeal against - Exercise of discretion of DGI under s. 33A Bankruptcy Act 1967 to issue certificate of discharge - Whether fatal for DGI not to have prepared an updated report on bankrupt's conduct and affairs as required under s. 33 Bankruptcy Act 1967 - Whether there was an abuse of s. 33A Bankruptcy Act 1967 -*

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Whether there was no reason for court to interfere with exercise of statutory discretion vested in DGI

This was an appeal from the decision of the SAR to dismiss the objection of the judgment creditor under s. 33B of the Bankruptcy Act 1967. Briefly, the facts were that a receiving and adjudication order was made against the respondent herein for failing to satisfy a judgment in the sum of RM68,032.68. His liability arose from a guarantee he had executed in favour of the applicant to enable his friend to buy a car on hire purchase. His friend defaulted in payment and the respondent was unable to pay the judgment sum. Subsequent to his bankruptcy, the respondent agreed to pay RM50 a month to the official assignee (now Director General of Insolvency) until full and final settlement of his debt. This application (encl. 58) was filed by the creditor to prohibit the Director General of Insolvency (DG1) from discharging the respondent from bankruptcy. The creditor, who was the financial institution that granted the hire purchase loan, objected before the learned SAR to the intention of the DG1 to issue a certificate of discharge. The principal ground was that the DGI had not updated the report made in the year 2000 for the purpose of the bankruptcy application. Therefore, counsel for the creditor argued that the crucial questions in respect of the financial affairs of the bankrupt were not answered. The creditor thus urged this court to question the basis of the exercise of the discretion of DGI under s. 33A to issue a certificate of discharge.

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Held (dismissing appeal by creditor):

(1) The DGI could not be faulted for not preparing a report that was required under s. 33. This was because the 'report' in s. 33 was prepared by the DGI for the attention of the court for the purpose of providing sufficient information to assist the decision making process. That was the reason why the report was deemed to be *prima facie* evidence under s. 33(8). If the report contained any adverse information that was within the contemplation of s. 33(6), the court was empowered to refuse a discharge. However, under s. 33A, the decision maker was the DGI himself and therefore it was common sense that he need not 'report' to himself about the status of the bankrupt. It must be assumed all the relevant information was that in the file of the bankrupt had been considered by the proper officer of the DGI before the notice of intention to discharge was issued. Therefore, it was not fatal for the DGI not to have prepared an updated report. (para 11)

(2) In reviewing the reasons for discharge under s. 33A, the court should, save for exceptional reasons, be slow to substitute its own views as to how that discretion should be exercised as that duty had been entrusted to the DGI by Parliament. The representative of the DGI in the instant case had deposed that the respondent had diligently complied with the order to pay RM50 for eight years. He further deposed that the respondent had no assets to be realized. He added that to continue with the administration of the bankruptcy would only burden the respondent as well as the government. The DGI also considered the fact that the respondent herein did not borrow money for himself to buy a car but he merely stood as a guarantor to his friend. This fact afforded significant mitigation in respect of the circumstances that contributed to the bankruptcy. Even under a discharge application by the court, the circumstances that contributed to the bankruptcy such as recklessness and extravagance or the absence of it such as being a social guarantor was a factor to consider in granting a discharge. (para 11)

(3) The power of the court to prohibit the DGI from issuing the certificate to discharge the respondent for a period of two years should only be exercised in clear cut cases of abuse of s. 33A. Guidance could be sought from s. 33(6) but the court should resist the temptation to apply them stringently as that would tantamount to exercising original discretion under

A s. 33(1). Clear cut cases of abuse would be where the bankrupt had obtained huge loans with no intention of paying them back or where the bankrupt was maintaining an extravagant lifestyle beyond his reported income or where he had continued to be reckless in his financial affairs. From the B affidavit of the representative of the DGI, there was no reason to infer that there had been any abuse of s. 33A. Therefore, there was no reason for this court to interfere with the exercise of the statutory discretion which had been vested in the DGI by delaying the discharge of the bankrupt for a C period of two years. (para 11)

Case(s) referred to:

Re Endon Tamseran ex p Parkash Singh Wasawa Singh [2009] 8 CLJ 379 HC ***(refd)***

D *Re Mohana Sundari M Subramaniam ex p United Prime Corporation Bhd [2004] 1 CLJ 624 HC* ***(refd)***

Re Siah Ooi Choe, ex p Hongkong and Shanghai Banking Corporation [1998] SLR 903 ***(refd)***

Legislation referred to:

E Bankruptcy Act 1967, ss. 33(1)(6), (8), 33A, 33B(6), 105(1)

For the appellant/creditor - Lina Wee; M/s Charles Ling Advocates
For the respondent/debtor - Kamarul & Salamah; Director General Insolvency

Reported by Suhainah Wahiduddin

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JUDGMENT

Ravinthran Paramaguru JC:

G **[1]** This is an appeal from the decision of the SAR to dismiss the objection of the judgment creditor under s. 33B of the Bankruptcy Act 1967.

Background Facts

H **[2]** A receiving and adjudication order was made against the respondent in this case on 27 January 2000 for failing to satisfy a judgment in the sum of RM68,032.68. His liability arose from a guarantee he had executed in favour of the applicant to enable his I friend one Law Kian Tan to buy a car on hire purchase. His friend defaulted in payment and the respondent was unable to pay the judgment sum. Subsequent to his bankruptcy, the respondent agreed to pay RM50 per month to the official assignee (now

director general of insolvency) until full and final settlement of his debt. The debt had by then totalled RM82,660.98 due to accretion of interest. The court made a consent order to that effect on 15 September 2000.

Objection Under S. 33B

[3] This application (encl. 58) was filed on 17 June 2008 by the creditor to prohibit the director general of insolvency (DGI, formerly official assignee) from discharging the respondent from bankruptcy. Under s. 33A which was introduced *vide* Act A1035 in 1998, the DGI was conferred the power to discharge a bankrupt by issuing a certificate of discharge although the debt to the creditors may not have been settled. The only statutory pre-condition is that at least five years must have elapsed from the date of the receiving and adjudication order. However, the DGI is required to give notice of his intention to do so to the creditors before issuing the said certificate. The creditors have 21 days to raise an objection before the bankruptcy court against the intended discharge of the bankrupt. For sake of convenience, I reproduced the two provisions below:

> 33A. Discharge of bankrupt by Certificate of Director General of Insolvency.
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> (1) The Director General of Insolvency may, in his discretion but subject to section 33B, issue a certificate discharging a bankrupt from bankruptcy.
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> (2) The Director General of Insolvency shall not issue a certificate discharging a bankrupt from bankruptcy under subsection (1) unless a period of five years has lapsed since the date the receiving order and the order by which he was adjudged bankrupt were made.
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> (3) Notice of every discharge under subsection (1) shall be given by the Director General of Insolvency to the Registrar and the Director General of Insolvency shall advertise the notice in a local newspaper as prescribed.
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> (4) The Director General of Insolvency shall, upon the application of any interested person, issue a copy of the certificate of discharge to the applicant upon payment of the prescribed fee.
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> 33B. Objection by creditor to discharge of bankrupt under section 33A.

A (1) Before issuing a certificate of discharge under section 33A, the Director General of Insolvency shall serve on each creditor who has filed a proof of debt a notice of his intention to issue the certificate;

B (2) A creditor who has been served with a notice under subsection (1) and who wishes to object to the issuance of a certificate discharging the bankrupt shall, within twenty-one days from the date of service of the notice, furnish a notice of the objection stating the grounds of his objection.

C (3) A creditor who does not furnish a notice of his objection and the grounds of his objection in accordance with subsection (2) shall be deemed to have no objection to the discharge.

D (4) A creditor who has furnished a notice of his objection and the grounds of his objection in accordance with subsection (2) may, within twenty-one days of being informed by the Director General of Insolvency that his objection has been rejected, make an application to the court for an order prohibiting the Director General of E Insolvency from issuing a certificate of discharge.

(5) Every application under subsection (4) shall be served on the Director General of Insolvency and on the bankrupt and the court shall hear the Official Assignee and the bankrupt before making an order on the application. F

(6) On an application made under subsection (4), the court may, if it thinks it just and expedient:

(a) dismiss the application;

G (b) make an order that for a period not exceeding two years a certificate of discharge shall not be issued by the Director General of Insolvency.

[4] The creditor who is the financial institution that granted the H hire purchase loan objected before the learned SAR to the intention of the DGI to issue a certificate of discharge. The principal ground was that the DGI had not updated the report made in the year 2000 for the purpose of the bankruptcy application. Therefore counsel for the creditor argued that crucial I questions in respect of the financial affairs of the bankrupt were not answered such as:

1. His income at present time.

2. Whether he could be made to pay more than RM50? A

3. Whether he is driving a car now?

4. What happened to the car he was driving in the year 2000?

[5] She also submitted that the bankrupt is only 38 years old and he has a Diploma in Graphics. The outstanding debt in question is more than RM80,000 after accretion of interests in spite of the respondent's diligent payment of RM50 for the past eight years. In short, she wanted to know the justification for the exercise of the discretion to discharge the respondent. The State Director of Insolvency on behalf of DGI deposed by way of affidavit in reply that: B C

1. That the bankruptcy had been administered for more that eight years.

2. That the respondent has no asset to be realised. D

3. That the respondent has contributed RM50 from February 2000 to August 2008.

4. That no dividend could be declared as the amount of fund in the estate of the respondent amounted to RM6,812.30 only as at August 2008. E

5. That it would be a burden to the government to continue to administer the bankruptcy as nothing further could be gained from the respondent. F

[6] It is apparent that the above reasons did not commend itself to the creditor as they have appealed against the learned SAR's dismissal of their objection under s. 33B of the Bankruptcy Act 1967. Before me the same arguments were repeated and it was urged that this court should question the basis of the exercise of the discretion of DGI under s. 33A to issue a certificate of discharge. G

[7] Under the scheme of the Bankruptcy Act 1967, apart from a scheme of composition, there are three routes a bankrupt can avail himself to secure a discharge from bankruptcy. Under s. 105(1) he could apply to annul the bankruptcy on the ground that all the debts had been paid in full or on the ground that the adjudication order should not have been made in the first place. The second method is for the bankrupt to approach the court under s. 33(1) to seek a discharge from bankruptcy. Under s. 33(1), it is mandatory for the court to consider the conduct of H I

A the bankrupt during his bankruptcy *vide* a report from the DGI. The report constitutes *prima facie* evidence of the statements therein contained by virtue of sub-s. 8. The guidelines for discharge are given in the section itself and under case law (see *Re Mohana Sundari M Subramaniam ex p United Prime Corporation*
B *Bhd* [2004] 1 CLJ 624. Section 33 seems to list out what conduct does not justify a discharge from bankruptcy rather than identify the converse of it. If the bankrupt had committed any of the offences listed under sub-s. (4), the court shall not, unless there are special reasons, give him a discharge. In the alternative
C the court may suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors. In addition if there is proof of the facts listed in sub-s. (6), the court shall:

D (a) refuse the order; or

(b) suspend the operation of the order for a specified time; or

(c) suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or

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(d) grant an order of discharge subject to such conditions as aforesaid.

[8] The facts listed under sub-s. (6) are a long list of activities
F that should not be indulged in by a bankrupt such as trading in the knowledge that he is insolvent, contracting debts that cannot be repaid etc. It also includes a list of circumstances preceding the bankruptcy that shows misconduct on the part of the bankrupt which brought about or caused the bankruptcy such as omitting
G to maintain account books for purpose of business dealings, extravagance in living, recklessness, gambling, want of reasonable care in business etc.

[9] The bankrupt in the instant case, had taken a third route to release himself from the shackles of bankruptcy, ie, through s. 33A
H which was inserted in 2003 by Parliament. In *Re Mohana Sundari M Subramaniam ex p United Prime Corporation Bhd*, Zulkefli Ahmad Makinudin J (as he then was) quoted with approval the following passage from the judgment of Warren Khoo J in the case of *Re Siah Ooi Choe, exp. Hongkong and Shanghai Banking Corporation*
I [1998] SLR 903 which discussed the philosophy behind the law that allowed bankrupts who have not settled their debt to earn a discharge:

> ... the Act was designed to meet two major conflicting concerns. One stemmed from the fact that many an individual businessman become insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle. It would be in the interests of society that people who had become bankrupt in such circumstances should be given a second chance in life ... The other concern was that, without proper safeguards, people who have used dishonest and fraudulent methods in conducting their business affairs to the detriment of their creditors might get an undeserved advantage from their own wrong doings.

[10] Zulkefli Ahmad Makinudin J then commented that the new of provision of s. 33A which conferred the power on the DGI to give discharge to a bankrupt after being one for five years is another provision:

> designed and enacted by Parliament in furtherance of their original intention to afford a bankrupt some relief.

[11] Very interestingly, unlike s. 33 under which a bankrupt seeks reprieve from the bankruptcy, s. 33A does not provide any guideline for the DGI to consider in granting a discharge. The only precondition is that five years must have elapsed since the commencement of the bankruptcy. Learned counsel for the creditor in this case has urged the court to prohibit the DGI from granting a discharge on the grounds that I enumerated earlier. The complaint of counsel is that the DGI had not updated his report on the respondent and had not considered his present financial circumstances, especially whether he could pay more to settle his debt in view of the fact that he is already eight years into his bankruptcy. In not so many words, counsel suggested that he could be probably be earning more than the RM1,200 per month which he earned in 2000. She did not cite any case that considered the application of s. 33A. I am not surprised that she failed to find any authority as the exercise of the discretion of the DGI is rarely objected to by the creditor. One such case where section 33A was considered was the decision of Ahmad Asnawi JC in *Re: Endon Tamseran; ex p Parkash Singh Wasawa Singh* [2009] 8 CLJ 379. The issue that arose in that case was whether the court could extend the order prohibiting the DGI from issuing a certificate to discharge the bankrupt for more than two years as stated in s. 33B(6). The court answered the question in the negative as the clear wording of s. 33B(6) empowers the court to only delay the issuance of the said certificate by two years but does not clothe the court with any discretion to extend the

prohibition beyond that period. In this case, this is the first time the creditor has approached the court upon receiving the notice of intention to discharge the respondent. The issue is whether the court could delay the issuance of the certificate by two years and if so, upon what grounds? The representative of the DGI had argued that the court cannot question the discretion of the DGI. To my mind, the court could certainly delay the issuance of the certificate by two years as this is clearly provided in s. 33B. However, the court should not be strictly guided by s. 33 because that is a provision where the court is vested with the power to discharge a bankrupt. Counsel for creditor's main complaint is that the DGI did not prepare an updated report on the respondent. In my opinion the DGI cannot be faulted for not preparing a report that is required under s. 33. This is because the "report" in s. 33 is prepared by the DGI for the attention of the court for the purpose of providing sufficient information to assist the decision making process. That is the reason why the report is deemed to be *prima facie* evidence under s. 33(8). It goes without saying that if the report contains any adverse information that is within the contemplation of s. 33(6), the court is empowered to refuse a discharge. However, under s. 33A, the decision maker is the DGI himself and therefore it is common sense that he need not "report" to himself about the status of the bankrupt. It must be assumed all the relevant information that is in the file of the bankrupt has been considered by the proper officer of the DGI before the Notice of Intention to discharge is issued. Therefore, I cannot agree with counsel for the creditor that it is fatal for the DGI not to have prepared an updated report. However, I note that for the purpose of the objection, the representative of the DGI has responded by way of affidavit giving grounds why he intends to discharge the respondent. In my opinion, in reviewing the reasons for discharge under s. 33A, the court should, save for exceptional reasons, be slow to substitute its own views as to how that discretion should be exercised as that duty has been entrusted to the DGI by Parliament. The court should be mindful that this is not an application under s. 33 where the court has the sole power to determine whether a bankrupt should be discharged. The power granted under s. 33B is only the power to delay the discharge of a bankrupt. The representative of the DGI in the instant case has deposed that the respondent has diligently complied with the order to pay RM50 for eight years. He further deposed that the respondent has no assets to be realised. He added that to continue with the administration of the bankruptcy would only burden the respondent as well as the government. The

outstanding amount is still a big sum as the payment of RM50 a month would never be able to catch up with the accretion of interests on a sum of over RM80,000. Therefore, if the situation were allowed to remain as it were, the bankruptcy would continue indefinitely as feared by the DGI. The DGI also considered the fact that the respondent in this case did not borrow money for himself to buy a car but he merely stood as a guarantor for his friend. Although as counsel pointed out, the guarantee agreement was signed before "social guarantor" was defined in the Bankruptcy Act 1967, the fact remains that this fact affords significant mitigation in respect of the circumstances that contributed to the bankruptcy. Even under a discharge application by the court, the circumstances that contributed to the bankruptcy such as recklessness and extravagance or the absence of it such as being social guarantor is a factor to consider in granting a discharge. As for the financial resources of the respondent at this point in time, I do not think that the court should go beyond the unrebutted affidavit of the representative of the DGI that there are no further assets to be realised. The affidavit and the submission of the creditor that the respondent may have more resources to settle his debt is, with due respect, mere speculation. In the premises, I am of the view that the power of the court to prohibit the DGI from issuing the certificate to discharge the respondent for a period of two years should only be exercised in clear cut cases of abuse of s. 33A. Guidance could be sought from s. 33(6) but the court should resist the temptation to apply them stringently as that would tantamount to exercising original discretion under s. 33(1). Clear cut cases of abuse would be where the bankrupt had obtained huge loans with no intention of paying them back or where the bankrupt is maintaining an extravagant lifestyle beyond his reported income or where he has continued to be reckless in his financial affairs. I note that even if the above facts were proved by the creditor, the court can only delay the discharge of the bankrupt by two years as Parliament in its wisdom had granted the power to discharge a bankrupt to the DGI. However, I hasten to add that in this case, from the affidavit of the representative of the DGI, there is no reason to infer that there has been any abuse of s. 33A. Therefore there is no reason for me to interfere with the exercise of the statutory discretion which has been vested in the DGI by delaying the discharge of the bankrupt for a period two years. The appeal by the creditor is dismissed. No order as to costs.